

FCC CHAIRMAN PROPOSES RECLASSIFICATION OF INTERNET ACCESS SERVICE

On May 6, 2010, the Chairman of the Federal Communications Commission (FCC or Commission), Julius Genachowski, released a statement proposing a new legal framework for the FCC's approach to broadband communications services. Specifically, Chairman Genachowski proposes recognizing the transmission component of broadband access service as a "telecommunications service" subject to the provisions of Title II of the Communications Act. Under the proposal, however, the FCC would apply only a limited number of Title II provisions to the transmission component and would formally forbear from application of others.

According to Chairman Genachowski, the new approach is necessary in light of the recent decision by the U.S. Court of Appeals for the D.C. Circuit in *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), which cast doubt on the FCC's legal authority to enact many of its proposed reforms, including network neutrality rules and many of the proposals recommended by the Commission's National Broadband Plan. Chairman Genachowski describes his proposal as a way "to restore the broadly supported status quo consensus that existed prior to the court decision on the FCC's role with respect to broadband Internet service." The Republican members of the Commission, Robert M. McDowell and Meredith A. Baker, dispute this characterization, deeming the proposed reclassification, "a stark departure from the long-established bipartisan framework for addressing broadband regulation that has led to billions in investment and untold consumer opportunities." Chairman Genachowski intends to seek quickly public comment on the new approach, which also is supported by Democratic FCC Commissioners Mignon Clyburn and Michael J. Copps.

BACKGROUND ON INTERNET REGULATION

The proposed reclassification represents a change of direction for the FCC, which formerly had sought to regulate Internet services under Title I of the Communications Act. In 2002, the FCC issued a declaratory ruling classifying cable modem service as an "information service subject to Title I," and not a "cable service" or "telecommunications service." Under the ruling, cable modem service is not subject to Title II (common carrier) or Title VI (cable) regulations but instead

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is subject to lesser regulation under the Commission's Title I "ancillary authority."¹ The FCC's 2002 ruling was challenged in court, eventually reaching the Supreme Court, which deferred to the Commission's interpretation and upheld the designation in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

After the *Brand X* decision, in 2005, the FCC adopted a policy statement laying out four principles to ensure an open Internet. In 2008, the Commission concluded that Comcast had violated these principles by selectively targeting and interfering with users' ability to download material using peer-to-peer applications like BitTorrent. The US Court of Appeals for the DC Circuit vacated that order in the *Comcast* case, decided in early April 2010.² In *Comcast*, the DC Circuit found that the FCC had failed to show it had the ancillary authority to sanction Comcast over the cable Internet provider's network management practices. The *Comcast* decision cast doubt on the FCC's authority to enact a series of planned reforms and prompted the FCC to change its legal approach to broadband regulation.

PROPOSED RECLASSIFICATION

Responding to the new limitations imposed by the *Comcast* decision, Chairman Genachowski has proposed a new legal framework for the FCC's regulation of Internet access service. He casts the framework as a "third way" that avoids both continued reliance on Title I "ancillary" authority and over-regulation that could result from applying all Title II provisions, while restoring the authority the FCC was thought to have before *Comcast*.

As set out in a separate statement by the FCC's General Counsel Austin Schlick, the proposed framework involves

separating out the "computing functionality" and the transmission components of retail Internet access. The computing functionality would be considered an "information service," and subject to whatever ancillary jurisdiction may exist under Title I, while the transmission component would be a "telecommunications service" subject to regulation under Title II. However, the FCC would seek to apply only certain provisions of Title II to broadband transmission services. Specifically, Internet access providers would have to comply with the following six sections with respect to the transmission component of Internet access services:

- Section 201 (banning "unjust or unreasonable" denials of or charges for service)
- Section 202 (prohibiting "unjust or unreasonable" discrimination for or against particular people or places)
- Section 208 (allowing the FCC to investigate complaints)
- Section 222 (protecting customers' privacy)
- Section 254 (promoting the goal of universal service)
- Section 255 (requiring access for persons with disabilities)

To guard against what Chairman Genachowski calls "regulatory overreach," the FCC would formally "forbear" from enforcing other sections of Title II, making it difficult for the FCC to reverse itself and begin applying those provisions to broadband transmission services.³ Mr. Schlick specifically mentions that the proposed changes would result in:

- no new network unbundling authority;
- no new rights of competing Internet Service providers to telephone incumbents' networks on a wholesale basis; and
- no required rate regulation.

¹ Title I of the Communications Act authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." A series of Supreme Court decisions has recognized that this provision gives the FCC "ancillary" jurisdiction in the absence of express statutory authority.

² See Arnold & Porter Advisory, "DC Circuit Finds FCC Lacked Jurisdiction to Enforce Net Neutrality Principles" (April 2010), available at: http://www.arnoldporter.com/public_document.cfm?id=15589&key=9J1.

³ In his statement, Genachowski noted that "the Commission has never reversed or undone a forbearance decision."

Chairman Genachowski and Mr. Schlick compare this approach with the one taken with regard to wireless communications, where Congress mandated the FCC generally to enforce Title II but consider forbearing from applying Title II provisions other than sections 201, 202, and 208. They cite the success of this forbearance framework, as evidenced by strong growth in the wireless industry, and suggest that similar success will occur with respect to broadband.

Mr. Schlick also notes that the Commission has broad authority to preempt inconsistent state requirements that frustrate valid federal policies, and that the proposed approach would continue to provide broadband access providers protection from unjustified state regulation. Mr. Schlick makes clear that the tailored forbearance approach would address only facilities-based providers that offer access transmission to the public at large, and not to Internet content, applications, and services or providers of negotiated, private carriage services.

Chairman Genachowski and Mr. Schlick both note that the lawfulness of the proposed approach could be confirmed through a single court case, as compared to the likely case-by-case litigation that would result from continued attempts to regulate broadband under Title I ancillary authority. According to the Chairman, the plan also would be an appropriate interim measure “[s]hould congressional leaders decide to take up legislation in the future to clarify the statute and the agency’s authority regarding broadband.”

Genachowski concludes his statement by asking the other Commissioners to join him in “launching a public process seeking comment on this narrow and tailored approach.”

RESPONSES FROM CONGRESS

Some Republicans have criticized the plan as exceeding the FCC’s power. Democrats generally have supported the proposal as being an appropriate, middle-ground approach. There are several pending bills in Congress that address the issue of the Commission’s authority to regulate broadband. However, it remains to be seen whether Congress will enact legislation on this issue.

We will be following these developments in future advisories. If you have any questions, please contact:

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